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before

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The enforcement of competition-related merger control laws is one of the most important functions of a modern competition authority. It is well-accepted today, at least in the United States and increasingly in other jurisdictions, that mergers, acquisitions and joint ventures that unambiguously benefit an economy's economic performance by increasing allocative and productive efficiency should be allowed to go forward, while combinations that create or facilitate the exercise of market power to the detriment of consumer welfare should be blocked. Moreover, as a consequence of the principle of limited government and economic liberalism, the competition agencies should not intervene in transactions that are competitively neutral and have no adverse effect on consumer welfare, even if they entail no economic efficiencies. Of course, the consumer welfare consequences of many transactions are ambiguous, with—depending on the affected market—some positive effects, some neutral effects, and some adverse effects. The object of merger control enforcement in these cases should be to conserve the good and the neutral and eliminate the bad through an appropriate restructuring of the transaction. Failing that, the enforcement agency should draw an appropriate balance in the exercise of prosecutorial discretion whether the transaction should be permitted to close without challenge or, alternatively, challenged in court in an effort to restructure or block the transaction.

These principles have significant implications for the process of merger review by the responsible merger control agencies. Overall, with a few notable exceptions, the Hart-Scott-Rodino Premerger Notification Act establishes an adequate statutory framework for merger review. The HSR Act requires, for transactions satisfying certain thresholds, the parties to file a premerger notification report and to observe a statutorily prescribed waiting period. The HSR Act also provides for a special discovery tool—the so-called "second request"—to gather information from the parties relevant to the merger review, and, of course, the agencies can utilize the other forms of precomplaint discovery available to them to obtain additional information and materials from the parties as well as from third-parties. The premerger notification and waiting period requirements, coupled with the second request and other discovery tools, are more than adequate to enable the agencies to make efficient, well-informed merger enforcement decisions.

But the existence of a good statutory framework does not ensure either a good process or good decisions. The HSR Act must be implemented and the merger review processed managed. While the enforcement agencies have done many things very well, there is significant room for further improvement. I group these needed improvements into five broad categories:

1. *Standards*: The agencies should have a more clearly articulated, operational enforcement philosophy both as to the merger review process and prosecutorial decision-making in order to guide internal decision-making at all levels and inform the business community of the standards the agencies will use in reviewing their transactions.

2. *Efficiency*: The agencies should have much more efficient processes that recognize and balance the costs and burdens on the parties of information collection, the length of time of the investigation, and Type I and Type II errors in merger review decision-making.
3. *Transparency*: The agencies should provide much more transparency in their investigations to the parties and should recognize that increased transparency throughout the process, coupled with a willingness to join issue early at the staff level, will lead to more efficient agency decision-making with less error.
4. *Uniformity*: The agencies, especially at the senior levels, should more actively manage their merger investigation units in order to accelerate the adoption across the agency of efficient merger investigation practices and reduce the wide variance that exist today across sections within each agency and across the agencies themselves in both attitude and approach.
5. *Accountability*: The agencies should reach out for more accountability in their management of the merger review process and in the propriety of their enforcement decisions by subjecting more of their process and outcome decisions to judicial review.

In almost all cases, the needed improvements can and should be accomplished with no change in the statutory scheme.